IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3997 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAJUBHAI PASABHAI BHIL

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 3997 of 2001

MR HR PRAJAPATI for Petitioner No. 1

MR SS PATEL AGP for Respondents No. 1-3

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 30/10/2001

ORAL JUDGEMENT

1. In exercise of powers under Section 3 (2) of the Gujarat Prevention of Anti-Social Activities Act, 1985 ('the Act' for short), District Magistrate, Banaskantha at Palanpur, vide order dated March 31, 2001, Annexure A

to the petition, detained the petitioner detenu.

2. The averments made in the petition and the grounds of detention manifest that the detaining authority has considered the petitioner as a bootlegger within the meaning of section 2 (b) of the Act as an offence under the Prohibition Act is registered against the petitioner and statements of two anonymous witnesses are also recorded against him in unregistered cases and, therefore, according to the detaining authority, the activities of the petitioner are prejudicial to the maintenance of public order and public health and the powers under Section 9 (2) of the Act are exercised by the detaining authority while detaining the petitioner by not disclosing the identity of those witnesses.

3. By filing this petition under Article 226 of the Constitution, the petitioner has assailed the impugned order of detention on various grounds and prayed to issue a writ of habeas corpus or any other appropriate writ, order or direction quashing the impugned order of detention and setting the petitioner at liberty forthwith.

4. The petitioner has challenged the order of detention on various grounds. Mr. Prajapati, learned advocate for the petitioner has however restricted his arguments to the fact that registration of one case under the Prohibition Act against the petitioner by itself cannot be called breach or disturbance of public order. It is merely a breach of the law and order situation and, therefore, the subjective satisfaction recorded by the detaining authority for exercising powers under section 9 (2) of the Act by not disclosing the identity of the witnesses cannot be considered as genuine.

5. So far as the statements of two witnesses recorded by the detaining authority are concerned, it is pointed out by the learned advocate for the petitioner that though privilege is claimed, same is not genuine in the absence of any reply affidavit filed on behalf of the detaining authority. Therefore, on both these counts the order of detention is vitiated and he urged to allow the petition and to quash and set aside the impugned order of detention and set the petitioner at liberty forthwith.

6. To buttress the aforesaid submission, learned advocate for the petitioner cited the following judgments:

(i) Piyush Kantilal Mehta v. Commissioner of Police,

AIR 1989 SC 491;

(ii) Om Prakash v. Commissioner of Police and others, AIR 1990 SC 496; and

(iii) Rashidmiya alias Chhava Ahmedmiya Shaikh v. Police Commissioner, Ahmedabad and another, AIR 1989 SC 1703.

7. Mr. S.S. Patel, learned AGP has opposed the petition by making oral submissions. He has contended that so far as the privilege claimed by the detaining authority by not disclosing identity of the witnesses is concerned, the detaining authority in the impugned order has recorded how subjective satisfaction is genuine because according to him witnesses have expressed their fear in disclosing their identity and therefore privilege is rightly claimed by not disclosing the identity of the witnesses. What is emphasized by the learned AGP is that so far as case registered against the petitioner under the Prohibition Act is concerned, undisputedly there is breach or disturbance of public order and not breach of law and order situation. Therefore, according to him, the activities of the petitioner are in the realm of breach of public order and hence the detaining authority has rightly considered section 3 (4) of the Act by observing that the activities of the petitioner are prejudicial to the maintenance of public order and the petitioner is engaged himself as a bootlegger which adversely affected the maintenance of public order and therefore he urged to dismiss the petition.

8. In support of his submission, the learned AGP has placed reliance on the judgment in the case of Kanuji S. Zala v. State of Gujarat and others, reported in 1999 (2) GLH 415.

9. I have considered the submissions advanced by the learned advocates appearing for the parties. I have also perused the averments made in the petition and also the impugned order of detention and the statements of the witnesses which are recorded by the detaining authority.

10. So far as the first contention with respect to statements of two witnesses which are recorded by the detaining authority and the privilege claimed under section 9 (2) of the Act is not genuine is concerned, it has substance in view of the fact that the detaining authority has not filed any affidavit in reply by explaining the fact as to how the witnesses have expressed their fear before him. Therefore, on this ground the order of detention is vitiated.

11. So for as the second contention about registration of a case under the Prohibition Act is concerned, according to the learned advocate for the petitioner, the activities of the detenu cannot be said to be a breach or disturbance of public order but it is in the realm of breach of law and order situation.

12. In the case of Piyush Kantilal Mehta (supra) the Supreme Court has held that it may be that the detenu is a bootlegger within the meaning of S. 2 (b) of the Act, but merely because he is a bootlegger he cannot be preventively detained under the provisions of the Act unless as laid down in sub-sec. (4) of S. 3 of the Act, his activities as a bootlegger affect adversely or are likely to affect adversely the maintenance of public order. A person may be very fierce by nature but so long as the public generally are not affected by his activities or conduct, the question of maintenance of public order will not arise. In order that an activity may be said to affect adversely the maintenance of public order, there must be material to show that there has been a feeling of insecurity among the general public. If any act of a person creates panic or fear in the minds of the members of the public upsetting the even tempo of life of the community, such act must be said to have a direct bearing on the question of maintenance of public order. The commission of an offence will not necessarily come within the purview of "public order".

13. In Kanuji's case (supra), in para 6, the Supreme Court has observed that as already stated earlier, in this case the detaining authority has specifically mentioned in the grounds that the activity of the detenu was likely to cause harm to the public health and that by itself is sufficient affecting adversely the public order as defined by the Act. The detaining authority has also stated that as a result of resorting to violence by the petitioner for carrying on his bootlegging activity, even tempo of public order has also disturbed on some occasions. In view of the material on record it cannot be said that the satisfaction of the District Magistrate, in this behalf, was not reasonable or genuine.

14. In Kanuji's case (supra), the Supreme Court has also considered three earlier decisions in the case of Piyush Kantilal Mehta (supra), Om Prakash (supra) and Rashidmiya (supra) and observed in para 4 that in none of the three cases relied upon by the learned counsel, the point whether public order can be said to have been disturbed on the ground that the activity of the detenu was harmful to the public health arose for consideration

and that the detaining authority has not recorded such satisfaction; moreover, in these three cases the detaining authority has referred to some incidents of beating but there was no material to show that as a result thereof even tempo of public order was disturbed, whereas in the case before the Supreme Court in the case of K.S. Zala v. State of Gujarat (supra), the detaining authority has specifically stated in the grounds of detention that selling of liquor by the petitioner and its consumption by the people of that locality was harmful to their health. It was also stated that the statements of the witnesses clearly show that as a result of violence resorted to by the petitioner even tempo of public life was disturbed in those localities for some time. That material on record clearly shows that the members of public of those localities had to run away from there or to go inside their houses and close their doors.

15. If we examine the present case on the anvil of he test which has been applied by the Supreme Court in the case of K.S. Zala (supra), i.e., with regard to the presence of credible material and as to how the detaining authority has made the mention against the petitioner being an obstruction to the public health and public order, I find that in the instant case so far as the statements of the witnesses which are recorded with regard to unregistered cases, privilege is not claimed genuinely. It is, of course, true that after narrating the particulars of the criminal case, the detaining authority has mentioned that the activities of the petitioner were an obstruction to the public health and public order but this bald observation cannot be taken to be decisive so as to arrive at the satisfaction that the activities of the petitioner were prejudicial to the public order or public health and that tempo of public life was disturbed. No observation made in any part of the judgment can be read in isolation and bereft the context. The judgment is to be read as a whole and even the observations which have been made by the Supreme Court in para 6 of the judgment are to be considered in presence of credible material before the detaining authority has been insisted upon. Thus, litmus test to find out as to whether it is a case of breach of public order or breach of public health is concerned, credible material has to be there. In the case of K.S. Zala (supra) before the Supreme Court, the detaining authority had also relied upon the statements of the witnesses so as to show that violence resorted to by the petitioner in that case had disturbed the even tempo of public life and the material on record had shown that members of the

public of those localities had to run away from there and to go inside their houses and to close their doors. No such fact situation has been mentioned in the present case. Therefore, in my view, mere registration of a case under the Prohibition Act by itself cannot be considered as in the realm of breach or disturbance of public order but merely it is a case of breach of law and order situation and, therefore, the subjective satisfaction recorded by the detaining authority is vitiated. Therefore, the order of detention on the basis of the solitary case registered against the petitioner cannot be sustained and the petition deserves to be allowed.

16. For the foregoing reasons, the petition succeeds and accordingly it is allowed. The impugned order of detention passed against the petitioner - detenu is hereby quashed and set aside. The detenu is ordered to be set at liberty forthwith if not required in connection with any other case. Rule is made absolute. No order as to costs. Direct service is permitted.

(A. M. Kapadia, J.)

(karan)